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THE BANK OF NEW YORK MELLON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA; SOUTHERN DIVISION

IN RE: MEDICAL CAPITAL SECURITIES
LITIGATION

CASE NO. ML 10-2145 DOC
(RNBx)

This document relates to:
CASE NO. SACV09-1048 DOC (RNBx)
STEVEN MASONEK, et al., individually and on
behalf of all those similarly situated,
Plaintiffs,

v.
WELLS FARGO BANK, NATIONAL
ASSOCIATION, and THE BANK OF NEW YORK
MELLON,

Defendants.

THE BANK OF NEW YORK MELLON,
Third-Party Plaintiff,

v.
CAPITAL FINANCIAL SERVICES, INC.,
CAPWEST SECURITIES, INC., COMMUNITY
BANKERS SECURITIES LLC, CULLUM &
BURKS SECURITIES, INC., NATIONAL
SECURITIES CORPORATION, OKOBOJI
FINANCIAL SERVICES INC., SECURITIES
AMERICA, INC., SIGNATURE FINANCIAL
GROUP, INC, and WFP SECURITIES
CORPORATION,

Third-Party Defendants.

THE BANK OF NEW YORK
MELLON'S AMENDED
THIRD-PARTY
COMPLAINT

ORIGINAL

BY FAX

FILED
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CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA

1 Defendant/Third-Party Plaintiff The Bank of New York Mellon (“BNYM”), by
2 its attorneys Gibson, Dunn & Crutcher LLP, respectfully alleges as follows:

3 **NATURE OF THE ACTION**

4 1. Plaintiffs Steven J. Masonek, Sandra J. Masonek, Robert B. Price, Mary
5 Zahara, Mark Masonek, Joann Hosking, Cynthia Masonek Swanson, Robert H.
6 Ludlow, Jr., on behalf of the Robert H. Ludlow, Jr. Revocable Trust 1999, Peter
7 Braunstein, Ann Braunstein, Michel Rapoport, and Kathleen Darrow (collectively,
8 “Plaintiffs”) have filed a putative class action against BNYM and Wells Fargo Bank,
9 National Association (“Wells Fargo”), captioned *Masonek, et al. v. Wells Fargo Bank,*
10 *National Association, et al.*, 09-1048 (C.D. Cal.) (the “*Masonek Action*”). The
11 *Masonek Action* is a constituent case in *In re Medical Capital Securities Litigation*,
12 No. ML 10-2145 (C.D. Cal.), a multi-district litigation pending before this Court. On
13 March 1, 2011, Plaintiffs filed their Third Amended Consolidated Complaint For
14 Breach of Contract (the “Third Amended Complaint”). (*See* 10-2145 D.E. 147.)

15 2. Plaintiffs seek to recover their alleged losses arising from their purchase
16 of promissory notes (the “Notes”) issued by Medical Capital Holdings, Inc. and its
17 affiliates (collectively, “MedCap”). Plaintiffs purport to represent a class of investors
18 who purchased MedCap Notes. MedCap is now allegedly unable to repay in full the
19 principal and interest due on some of the Notes.

20 3. BNYM served as indenture trustee for Notes issued by certain special
21 purpose corporations affiliated with MedCap: Medical Provider Financial Corporation
22 II (“MP II”), Medical Provider Financial Corporation IV (“MP IV”), and Medical
23 Provider Funding Corporation VI (“MP VI”).

24 4. Wells Fargo served as indenture trustee for Notes issued by other special
25 purpose corporations affiliated with MedCap: Medical Provider Financial Corporation
26 III (“MP III”), and Medical Provider Funding Corporation V (“MP V”).

27 5. The Third-Party Defendants named herein are broker-dealers that
28 marketed and sold certain of the Notes (the “BD Defendants”).

1 6. Plaintiffs allege that certain Notes issued by MP II, MP III, MP IV, MP
2 V, and MP VI are now in default. The putative class in the *Masonek* Action consists of
3 all holders of these allegedly defaulted Notes.

4 7. The BD Defendants sold a significant number of these allegedly defaulted
5 Notes to Plaintiffs and members of the putative class in the *Masonek* Action.

6 8. The BD Defendants were instrumental links in the chain of distribution of
7 the MedCap Notes.

8 9. The BD Defendants were obligated under applicable law to sell the
9 MedCap Notes only to persons: (a) who qualified as “accredited investors” under
10 applicable federal laws and regulations, including, but not limited to, the financial or
11 other requirements for accredited investors established by the Securities and Exchange
12 Commission in Regulation D, 17 C.F.R. §230.501 *et seq.*, promulgated under the
13 Securities Act of 1933; and (b) for whom an investment in the Notes was a suitable
14 investment in light of the investor’s circumstances, including, but not limited to, the
15 investor’s age, net worth, income, investment experience, investment goals and
16 tolerance for risk of loss. In addition, upon information and belief, each of the BD
17 Defendants entered into a written agreement with the issuer of the MedCap Notes and
18 agreed to offer and sell the Notes only to accredited investors as defined in Regulation
19 D and only to those investors who also met all applicable suitability standards.

20 10. Upon information and belief, the BD Defendants breached their
21 obligations to MedCap investors who purchased Notes from the BD Defendants,
22 including Plaintiffs and members of the putative class in the *Masonek* Action, by: (a)
23 selling the Notes to investors for whom the Notes were an unsuitable investment given,
24 *inter alia*, the investors’ age, net worth, income, investment experience, investment
25 goals, and/or tolerance for risk of loss; and (b) failing to make proper disclosures to
26 investors regarding the risks of the Notes.

27 11. As outlined *infra*, many of the BD Defendants are also defendants in
28 *McCoy, et al. v. Cullum & Burks Securities, et al.*, ML 10-2145 (the “*McCoy* Action”),

1 a constituent case in the *In re Medical Capital Securities Litigation* multi-district
2 litigation. The *McCoy* Action is a putative class action brought on behalf of certain
3 investors who purchased MedCap Notes from these BD Defendants. The putative
4 class in the *McCoy* Action is a subset of the putative class in the *Masonek* Action.
5 Plaintiffs in the *McCoy* Action have brought causes of action for negligence and for
6 violations of the federal securities laws.

7 12. In addition, as outlined *infra*, hundreds of arbitration proceedings have
8 been instituted by MedCap investors against certain of the BD Defendants before the
9 Financial Industry Regulatory Authority (“FINRA”), and some of the BD Defendants
10 have also been subjects of regulatory inquiries in connection with their sale of MedCap
11 Notes.

12 13. The BD Defendants’ wrongful acts and/or omissions caused any harm
13 allegedly suffered by Plaintiffs or members of the putative class in the *Masonek* Action
14 who bought Notes from the BD Defendants.

15 14. On July 27, 2011, Judge David O. Carter issued an order granting class
16 certification in the *Masonek* Action. (See ML 10-2145 D.E. 240.) BNYM contends that
17 the certification of any class in the *Masonek* Action is not warranted and does not meet
18 the requirements of Fed. R. Civ. P. 23. To the extent that this Third-Party Complaint is
19 directed to purported claims by members of the putative class, such allegations are not
20 intended to be, and should not be construed to be, admissions that a class is appropriate
21 or should be certified in the *Masonek* Action. In the event a class is decertified in the
22 *Masonek* Action, BNYM will seek leave to amend this Third-Party Complaint to
23 address only the claims of the actual plaintiffs against the appropriate broker-dealer
24 Third-Party Defendants.

25 15. BNYM denies that it is responsible in any manner for any damages
26 alleged in Plaintiffs’ Third Amended Complaint. However, in the event BNYM is held
27 liable to any Plaintiff or member of the putative class in the *Masonek* Action who
28 bought Notes from any BD Defendant, BNYM is entitled to indemnity and/or

1 contribution from that BD Defendant.

2 **JURISDICTION AND VENUE**

3 16. This Court has subject matter jurisdiction over this action pursuant to 28
4 U.S.C. § 1367(a). The claims asserted in this Third-Party Complaint arise out of the
5 same nucleus of operative facts as the claims asserted in the *Masonek* Action, and
6 therefore are so related to the claims asserted in the *Masonek* Action that they form
7 part of the same case or controversy under Article III of the United States Constitution.
8 This Court has original jurisdiction over this action pursuant to the Class Action
9 Fairness Act, 28 U.S.C. § 1332(d)(11). The amount in controversy exceeds
10 \$5,000,000, exclusive of interests and costs, and there is a diversity of citizenship
11 between Plaintiffs and Defendants.

12 17. This Court also has subject matter jurisdiction over this action pursuant to
13 28 U.S.C. § 1332(a). There is a diversity of citizenship between BNYM and each of
14 the BD Defendants. The amount in controversy between BNYM and each BD
15 Defendant exceeds \$75,000.

16 18. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a)(2). This
17 District has jurisdiction over the *Masonek* Action; a substantial part of the events, acts,
18 omissions, and transactions complained of occurred in this District; and at all relevant
19 times herein, the BD Defendants conducted substantial business and/or committed
20 violations of law by acts committed in this District.

21 **PARTIES**

22 **A. Third-Party Plaintiff**

23 19. Defendant/Third-Party Plaintiff BNYM is a New York chartered bank
24 with its principal executive offices and headquarters in New York, New York.

25 **B. Third-Party Defendants**

26 20. Third-Party Defendant **Capital Financial Services, Inc.** ("Capital
27 Financial") is a Wisconsin corporation with a principal place of business in Minot,
28 North Dakota, and offices throughout the United States, including in the State of

1 California.

2 21. Upon information and belief, Capital Financial sold approximately
3 \$10,936,000 of Notes issued by MP II that have subsequently defaulted; approximately
4 \$24,454,000 of Notes issued by MP IV, Series I that have subsequently defaulted;
5 approximately \$16,050,000 of Notes issued by MP IV, Series II that have subsequently
6 defaulted; and approximately \$11,115,798 of Notes issued by MP VI that have
7 subsequently defaulted.

8 22. Upon information and belief, Capital Financial sold to residents of the
9 State of California approximately 141 Notes issued by MP II, MP III, MP IV, MP V,
10 and MP VI that have subsequently defaulted, totaling approximately \$15,941,000.
11 Capital Financial has been licensed to sell securities in the State of California since
12 1986 and has a registered agent for service of process in this State.

13 23. On or about April 7, 2011, FINRA announced sanctions against Capital
14 Financial's registered representatives Jeffrey Allen Lindsey and Bradley Paul Wells,
15 two members of Capital Financial's New Products Committee, finding that they
16 violated FINRA Rule 2010 and National Association of Securities Dealers ("NASD")
17 Rules 3010 and 2110 by permitting the firm to sell Notes issued by MP VI without
18 conducting appropriate due diligence. (*See Lindsey*, FINRA Letter of Acceptance,
19 Waiver and Consent, No. 2009019125901 (Feb. 23, 2011); *Wells*, FINRA Letter of
20 Acceptance, Waiver and Consent, No. 2009019125902 (Feb. 23, 2011).)

21 24. Capital Financial is a defendant in the *McCoy* Action. Capital Financial
22 has answered the negligence claim alleged against it in the *McCoy* Action. (*See* ML
23 10-2145 D.E. 75.)

24 25. A number of FINRA arbitration proceedings have been instituted against
25 Capital Financial by MedCap investors. (*Billitteri v. Securities America, Inc., et al.*,
26 09-1568, (N.D. Tex. 2011), D.E. 320-1, at 8-45.)

27 26. Third-Party Defendant **CapWest Securities, Inc.** ("CapWest") is a
28 Colorado corporation with a principal place of business in Lakewood, Colorado, and

1 offices throughout the United States, including in the State of California.

2 27. Upon information and belief, CapWest sold approximately \$5,684,000 of
3 Notes issued by MP II that have subsequently defaulted; approximately \$12,460,000 of
4 Notes issued by MP IV, Series I that have subsequently defaulted; and approximately
5 \$12,393,000 of Notes issued by MP IV, Series II that have subsequently defaulted.

6 28. Upon information and belief, CapWest sold to residents of the State of
7 California approximately 117 Notes issued by MP II, MP III, MP IV, and MP V that
8 have subsequently defaulted, totaling approximately \$14,322,000. CapWest has been
9 licensed to sell securities in the State of California since 1994 and has a registered
10 agent for service of process in this State.

11 29. CapWest is a defendant in the *McCoy* Action. CapWest has answered the
12 negligence claim alleged against it in the *McCoy* Action. (See ML 10-2145 D.E. 84.)

13 30. Third-Party Defendant **Community Bankers Securities, LLC**
14 (“Community Bankers”) is a Colorado corporation with a principal place of business in
15 Richmond, Virginia, and offices throughout the United States.

16 31. Upon information and belief, Community Bankers sold approximately
17 \$4,044,000 of Notes issued by MP II that have subsequently defaulted; approximately
18 \$13,088,000 of Notes issued by MP IV, Series I that have subsequently defaulted;
19 approximately \$6,540,000 of Notes issued by MP IV, Series II that have subsequently
20 defaulted; and approximately \$6,787,000 of Notes issued by MP VI that have
21 subsequently defaulted.

22 32. Upon information and belief, Community Bankers sold to residents of the
23 State of California approximately 11 MedCap Notes issued by MP II, MP IV, MP V,
24 and MP VI that have subsequently defaulted, totaling approximately \$676,000.

25 33. On or about January 19, 2011, a FINRA arbitration panel found
26 Community Bankers culpable to an investor who had purchased a MedCap Note from
27 Community Bankers representative John Guyette. The investor had brought causes of
28 action for (1) unsuitability; and (2) negligence, misrepresentation, concealment, and

1 breach of fiduciary duty. The FINRA panel awarded over \$700,000 in damages,
2 including compensatory damages, attorneys' fees, and interest. (*See Casson v.*
3 *Community Bankers Securities, LLC*, FINRA Arb. No. 09-06444 (Jan. 19, 2011).)

4 34. Third-Party Defendant **Cullum & Burks Securities, Inc.** ("Cullum &
5 Burks") is a Texas corporation with a principal place of business in Dallas, Texas, and
6 offices throughout the United States, including in the State of California.

7 35. Upon information and belief, Cullum & Burks sold approximately
8 \$301,000 of Notes issued by MP II that have subsequently defaulted; approximately
9 \$3,897,000 of Notes issued by MP IV, Series I that have subsequently defaulted;
10 approximately \$567,000 of Notes issued by MP IV, Series II that have subsequently
11 defaulted; and approximately \$2,946,000 of Notes issued by MP VI that have
12 subsequently defaulted.

13 36. Upon information and belief, Cullum & Burks sold to residents of the
14 State of California approximately 89 Notes issued by MP II, MP III, MP IV, MP V,
15 and MP VI that have subsequently defaulted, totaling approximately \$6,876,000.

16 37. Cullum & Burks is a defendant in the *McCoy* Action. Cullum & Burks
17 has answered the negligence claim alleged against it in the *McCoy* Action. (*See* ML
18 10-2145 D.E. 65.)

19 38. On or about April 7, 2011, FINRA announced sanctions against Cullum &
20 Burks' registered principals Timothy Cullum and Steven Burks, finding that they
21 violated FINRA Rule 2010 and NASD Rules 3010 and 2110 by permitting the firm to
22 sell Notes issued by MP VI without conducting appropriate due diligence. (*See*
23 FINRA Letter of Acceptance, Waiver and Consent, No. 20090118818001 (Feb. 15,
24 2011).)

25 39. Third-Party Defendant **National Securities Corp.** ("National Securities")
26 is a Washington corporation with principal places of business in Seattle, Washington,
27 and New York, New York, and offices throughout the United States, including in the
28 State of California.

1 40. Upon information and belief, National Securities sold approximately
2 \$1,370,000 of Notes issued by MP II that have subsequently defaulted; approximately
3 \$7,018,000 of Notes issued by MP IV, Series I that have subsequently defaulted;
4 approximately \$4,264,000 of Notes issued by MP IV, Series II that have subsequently
5 defaulted; and approximately \$7,371,250 of Notes issued by MP VI that have
6 subsequently defaulted.

7 41. Upon information and belief, National Securities sold to residents of the
8 State of California approximately 184 Notes issued by MP II, MP III, MP IV, MP V,
9 and MP VI that have subsequently defaulted, totaling approximately \$20,735,000.
10 National Securities has been licensed to sell securities in the State of California since
11 1981 and has a registered agent for service of process in this State.

12 42. National Securities is a defendant in the *McCoy* Action. National
13 Securities has answered the negligence claim alleged against it in the *McCoy* Action.
14 (*See* ML 10-2145 D.E. 68.)

15 43. Third-Party Defendant **Okoboji Financial Services, Inc.** (“Okoboji”) is
16 an Iowa corporation with a principal place of business in Okoboji, Iowa, and offices
17 throughout the United States.

18 44. Upon information and belief, Okoboji sold approximately \$2,224,000 of
19 Notes issued by MP II that have subsequently defaulted; approximately \$9,090,000 of
20 Notes issued by MP IV, Series I that have subsequently defaulted; and approximately
21 \$5,074,000 of Notes issued by MP IV, Series II that have subsequently defaulted.

22 45. Upon information and belief, Okoboji sold to residents of the State of
23 California approximately six Notes issued by MP IV and MP V that have subsequently
24 defaulted, totaling approximately \$435,000.

25 46. On or about March 7, 2011, a FINRA arbitration panel found Okoboji
26 culpable for negligent misrepresentation and other violations against noteholders who
27 purchased MP V Notes and another private placement offering from Okoboji. The
28 FINRA panel awarded the noteholders approximately \$300,000 in compensatory

1 damages. (*See Husman v. Okoboji Financial Services, Inc.*, FINRA Arb. No. 09-
2 06559 (Mar. 7, 2011).)

3 47. Okoboji is a defendant in *Barber, et al. v. Okoboji Fin. Serv., Inc.*, No.
4 10-4034 (D.S.D.), an action brought by a Medical Capital Noteholder alleging breach
5 of fiduciary duty, violations of FINRA rules of conduct, and violations of state and
6 federal securities laws.

7 48. Third-Party Defendant **Securities America, Inc.** ("Securities America")
8 is a Delaware corporation with a principal place of business in La Vista, Nebraska, and
9 offices throughout the United States, including in the State of California.

10 49. Upon information and belief, Securities America sold approximately
11 \$11,894,000 of Notes issued by MP II that have subsequently defaulted; approximately
12 \$61,575,000 of Notes issued by MP IV, Series I that have subsequently defaulted;
13 approximately \$62,147,000 of Notes issued by MP IV, Series II that have subsequently
14 defaulted; and approximately \$100,000 of Notes issued by MP VI that have
15 subsequently defaulted.

16 50. Upon information and belief, Securities America sold to residents of the
17 State of California approximately 676 Notes issued by MP II, MP III, MP IV, and MP
18 V that have subsequently defaulted, totaling approximately \$64,153,000. Securities
19 America has been licensed to sell securities in the State of California since 1984 and
20 has a registered agent for service of process in this State.

21 51. On or about January 26, 2010, the Secretary of the Commonwealth of
22 Massachusetts, Securities Division (the "Massachusetts Securities Division") filed an
23 Administrative Complaint against Securities America, claiming that it violated the
24 antifraud provision of Massachusetts Securities Laws and NASD Interpretive Material
25 2310-2, and rules 2110, 2120, and 2210, which are incorporated in the state statutes.
26 (*See Complaint, In re Securities America*, No. 2009-0085 (Mass. Sec. Div. Jan. 26,
27 2010).) The Massachusetts Securities Division alleged that Securities America failed
28 to conduct proper due diligence and misled customers in the sale of MedCap Notes.

1 An administrative hearing took place throughout the fall and winter of 2010.

2 52. On May 23, 2011, Securities America entered into a Consent Order with
3 the Massachusetts Securities Division settling the regulatory action against it.
4 Securities America agreed to make restitution to each investor in Massachusetts who
5 purchased Notes from Securities America. The Consent Order reaches the legal
6 conclusion that Securities America made unsuitable recommendations of securities to
7 investors concerning MedCap Notes. (*See* Consent Order, *In re Securities America*,
8 No. 2009-0085 (Mass. Sec. Div. May 23, 2011, at ¶ 78). While Securities America
9 neither admitted nor denied the conclusions, the order noted that many Massachusetts
10 investors were unsophisticated and relied on their broker to explain to them the
11 structure of the notes. Many of these investors had the false impression that the
12 MedCap Notes were low-risk investments.

13 53. On or about August 4, 2010, the Commissioner of Securities and
14 Insurance of the State of Montana filed a Notice of Proposed Agency Disciplinary
15 Action against Securities America, claiming that it and certain agents violated the
16 Securities Act of Montana. The Commissioner alleged that Securities America failed
17 to conduct proper due diligence and misled customers in the sale of MedCap Notes.
18 (*See* Notice of Proposed Agency Disciplinary Action & Opportunity for Hearing, *In re*
19 *Securities America, Inc.*, No. SEC-2010-48 (Mont. Comm'r of Sec. & Ins. Aug. 4,
20 2010).)

21 54. Upon information and belief, over 250 FINRA arbitration proceedings
22 have been instituted against Securities America by MedCap investors.

23 55. On or about December 31, 2010, a FINRA arbitration panel found
24 Securities America culpable of negligence and other violations against a noteholder
25 who purchased a MedCap Note from Securities America representative Randall Ray
26 Talbott. The FINRA panel found that Securities America was liable for approximately
27 \$1,200,000 in compensatory damages, punitive damages, and attorneys' fees and costs.
28 (*See Wayman v. Securities America, Inc.*, FINRA Arb. No. 10-00012 (Dec. 31, 2010).)

1 56. Securities America is a defendant in the *McCoy* Action. It was also
2 named as a defendant in *Grossbard, et al. v. Securities America Financial*
3 *Corporation, et al.*, SACV 10-478 (the “*Grossbard* Action”). In the *Grossbard*
4 Action, this Court determined that plaintiffs stated a claim for negligence against
5 Securities America. (See ML 10-2145 D.E. 52.) Plaintiffs in the *Grossbard* Action
6 and the *McCoy* Action have filed a consolidated complaint. (See ML 10-2145 D.E.
7 61).

8 57. On July 27, 2011, Judge Royal Furgeson of the Northern District of
9 Texas noted that his final approval of a settlement between Securities America and a
10 proposed class of Plaintiffs who purchased MP I, II, III, IV, and V notes from
11 Securities America would be forthcoming. Several persons who purchased MP II and
12 MP IV Notes from Securities America opted out of that settlement. Further, at least
13 several dozen noteholders opted out of the class action settlement to pursue arbitration
14 claims, the majority of which have also been settled in a group settlement. To the
15 extent that the settlements bar claims of contribution and indemnity against Securities
16 America, this Complaint only seeks indemnity with regard to purchasers of MedCap
17 Notes who have not settled with Securities America. BNYM is informed and believes
18 and thereon alleges that some of the Noteholders who opted out from the settlement
19 are members of the putative class in this case against BNYM.

20 58. Third-Party Defendant **Signature Financial Group, Inc.** (“Signature
21 Financial”) is a Missouri corporation with a principal place of business in Torrance,
22 California.

23 59. Upon information and belief, Signature Financial sold approximately
24 \$4,112,000 of Notes issued by MP II that have subsequently defaulted; approximately
25 \$6,103,000 of Notes issued by MP IV, Series I that have subsequently defaulted;
26 approximately \$2,038,000 of Notes issued by MP IV, Series II that have subsequently
27 defaulted; and approximately \$6,085,000 of Notes issued by MP VI that have
28 subsequently defaulted.

60. Upon information and belief, Signature Financial sold to residents of the State of California approximately 128 Notes issued by MP II, MP III, MP IV, MP V, and MP VI that have subsequently defaulted, totaling approximately \$19,193,000. Signature Financial has a registered agent for service of process in this State.

61. Third-Party Defendant **WFP Securities Corp.** ("WFP") is a California corporation with a principal place of business in San Diego, California.

62. Upon information and belief, WFP sold approximately \$5,136,000 of Notes issued by MP II that have subsequently defaulted; approximately \$5,442,000 of Notes issued by MP IV, Series I that have subsequently defaulted; and approximately \$5,966,000 of Notes issued by MP IV, Series II that have subsequently defaulted.

63. Upon information and belief, WFP sold to residents of the State of California approximately 325 Notes issued by MP II, MP III, MP IV, MP V, and MP VI that have subsequently defaulted, totaling approximately \$27,135,000. WFP has been licensed to sell securities in the State of California since 1994 and has a registered agent for service of process in this State.

64. In a filing with the SEC, WFP disclosed that FINRA was conducting an investigation of WFP related to MedCap.

65. An interpleader complaint filed in the Central District of California alleges that numerous WFP clients have brought claims against it, alleging that WFP failed to investigate and conduct proper due diligence on MedCap Notes and that they made misrepresentations and omissions of material information. The interpleader complaint lists thirteen pending arbitrations against WFP concerning MedCap Notes. (*See Complaint in the Nature of Interpleader, Endurance American Specialty Insurance Co. v. WFP Securities Corp. et al.*, No. CV11-01436 (C.D. Cal. Feb 16, 2011), D.E. 1).

66. Additionally, noteholder John Sothras sent a demand letter to WFP alleging unsuitable recommendations of MedCap Notes and failure to conduct proper due diligence. (*See id.*)

1 **C. Non-Parties**

2 67. Various non-parties also participated in the wrongdoing alleged by
3 Plaintiffs in the *Masonek* Action. Many of these persons and entities, including many
4 of those described below, have been named as defendants in an action initiated by the
5 Securities and Exchange Commission in July 2009 (the “SEC Action”). (*See Sec. &*
6 *Exch. Comm. v. Medical Capital Holdings, Inc., et al.*, SACV 09-818 (C.D. Cal.), D.E.
7 185.) The Court’s Permanent Injunction Order (SACV 09-818 D.E. 44), instituted in
8 connection with the SEC Action, precludes claims against MedCap. BNYM reserves
9 the right to seek leave from the Court to amend its Third-Party Complaint at a future
10 date to add as third-party defendants certain other persons and entities, including
11 persons and entities affiliated with MedCap, including, but not limited to:

12 68. Medical Capital Holdings, Inc. (“MCH”): MCH is a Nevada corporation
13 with its principal place of business in Tustin, California. Through various wholly-
14 owned operating subsidiaries and special purpose corporations, MCH provided
15 financing to healthcare providers by purchasing their accounts receivables and making
16 secured loans to them. MCH also invested in non-receivable assets, as well as assets
17 not related to the healthcare industry. MCH used its special purpose corporations to
18 raise money from investors to fund the purchase of assets and other lending activity.
19 MCH used operating subsidiaries to underwrite, monitor, administer, and service the
20 financing.

21 69. Medical Capital Corporation (“MCC”): MCC is a Nevada corporation
22 and wholly owned subsidiary of MCH, with its principal place of business in Tustin,
23 California. MCC was the administrator for each of MCH’s special purpose
24 corporations—including MP II, MP IV, and MP VI—and provided management,
25 underwriting, and administrative services, such as bookkeeping, payroll, and
26 accounting services, including administration of all investor promissory notes and
27 interest payments.

28 70. Sidney M. Field (“Field”): Upon information and belief, Field is a

1 resident of Villa Park, California. Field was the CEO and director of MCH and its
2 subsidiaries during the relevant period.

3 71. Joseph J. Lampariello ("Lampariello"): Upon information and belief,
4 Lampariello resides in Newport Beach, California. Lampariello was the president,
5 COO, and director of MCH and its subsidiaries during the relevant period.

6 72. Medical Provider Financial Corporation II: MP II is a Nevada
7 corporation and wholly-owned special purpose corporation of MCH that, upon
8 information and belief, was formed in October 2003. Upon information and belief,
9 from January 2004 to December 2005, MP II conducted a Note offering, raising
10 approximately \$251.7 million through the issuance of approximately 3,458 Notes to
11 investors.

12 73. Medical Provider Financial Corporation IV: MP IV is a Nevada
13 corporation and wholly-owned special purpose corporation of MCH that, upon
14 information and belief, was formed in July 2005 and commenced operations in
15 October 2006. Upon information and belief, from November 2006 through October
16 2008, MP IV conducted two series of Note offerings, raising approximately \$401.3
17 million through the issuance of approximately 4,222 Notes to investors.

18 74. Medical Provider Funding Corporation VI: MP VI is a Nevada
19 corporation and wholly-owned SPC of MCH that, upon information and belief, was
20 formed in April 2008. Upon information and belief, from August 2008 to July 2009,
21 MP VI conducted a Note offering and, as of June 19, 2009, it had raised approximately
22 \$76.9 million through the issuance of approximately 700 Notes to investors.

23 **STATEMENT OF FACTS**

24 **A. Background**

25 **1. MedCap and Its Issuance of Notes**

26 75. MCH and its affiliates invested in medical receivables, made loans and
27 extended lines of credit to medical and non-medical companies, and invested in real or
28 personal property.

1 76. MCH sought to obtain the money to engage in its business by issuing
2 Notes to investors.

3 77. MCH did not issue the Notes directly. Rather, it formed special purpose
4 corporations, which issued the Notes. These special purpose corporations included MP
5 II, MP III, MP IV, MP V, and MP VI.

6 78. The Notes were sold to investors through registered broker-dealers,
7 including the BD Defendants.

8 79. The Notes were highly risky investments and each of the MedCap issuers
9 stated that they intended that the Notes would only be purchased by an investor: (a)
10 who qualified as an accredited investor under applicable federal laws and regulations,
11 including, but not limited to, the financial or other requirements for accredited
12 investors established by the Securities and Exchange Commission in Regulation D
13 promulgated under the Securities Act of 1933; and (b) for whom an investment in the
14 Notes was a suitable investment in light of the investor's circumstances, including, but
15 not limited to, the investor's age, net worth, income, investment experience,
16 investment goals and tolerance for risk of loss.

17 80. BNYM did not sell, or attempt to sell, any Notes to any investor.

18 81. Each series of Notes was to be secured by separate assets, and separate
19 trust accounts were created to hold these assets.

20 82. BNYM served as the indenture trustee in connection with the Notes
21 issued by MP II, MP IV, and MP VI.

22 83. Wells Fargo served as indenture trustee in connection with the Notes
23 issued by MP III and MP V.

24 **2. The Nature and Extent of BNYM's Obligations**

25 84. Each series of Notes was accompanied by a Note Issuance and Security
26 Agreement ("NISA"), which defined the nature and extent of any obligations BNYM
27 had in connection with MedCap and the Notes.

28 85. As indenture trustee, BNYM's role was essentially limited to maintaining

1 the funds in the trust accounts for MP II, MP IV, and MP VI, and periodically
2 releasing funds pursuant to MedCap's instructions.

3 86. BNYM was not responsible for investigating or verifying the information
4 contained in MedCap's fund requests. Nor did BNYM have the duty to supervise the
5 types of assets MedCap purchased or how MedCap accounted for those assets in its
6 books and records.

7 87. The NISAs were clear that BNYM "[i]n the absence of bad faith on its
8 part . . . [could] conclusively rely, as to the truth of the statements and the correctness
9 of the opinions expressed therein, upon certificates or opinions furnished to the
10 Trustee." The Private Placement Memoranda ("PPMs") issued by MedCap for each
11 Note offering confirmed BNYM's limited function and disclosed that BNYM had no
12 obligation "to monitor, supervise or verify" MedCap's actions and was not
13 "responsible . . . to independently determine any collateral coverage ratios, or to
14 otherwise make any inquiry or investigation or have any responsibility as to whether
15 [the SPC was] in default or had breached any obligation."

16 88. Despite this limited role undertaken by BNYM, Plaintiffs seek to hold
17 BNYM liable for the entirety of their investment losses.

18 89. BNYM denies the allegations in Plaintiffs' Third Amended Complaint,
19 and hereby incorporates all responses in its Answer to Plaintiffs' Third Amended
20 Complaint (09-1048 D.E. 169) as if fully set forth herein.

21 **B. The BD Defendants' Pattern of Wrongful Conduct**

22 90. The BD Defendants acted wrongfully in the sale of MedCap Notes by
23 turning a blind eye to their obligations to their own clients, the investors in the Notes,
24 in favor of the easy gain of high commissions paid by MedCap.

25 91. Upon information and belief, the BD Defendants: (a) knowingly or
26 negligently marketed, recommended, and sold MedCap Notes to investors for whom
27 the high risk Notes were not a suitable investment in light of the individual investor's
28 age, net worth, income, investment experience, investment goals, and/or tolerance for

1 risk of loss; and (b) knowingly or negligently misrepresented and/or omitted to
2 disclose the risks associated with the MedCap Notes to their clients.

3 **1. The BD Defendants Sold the Notes to Investors for Whom the Notes**
4 **Were Not a Suitable Investment**

5 92. Upon information and belief, the BD Defendants marketed,
6 recommended, and sold MedCap Notes to numerous investors for whom the BD
7 Defendants knew or should have known the Notes were unsuitable investments in light
8 of the individual investor's age, net worth, income, investment experience, investment
9 goals, and/or tolerance for risk of loss.

10 93. Upon information and belief, these investors included the elderly and
11 retirees, investors with low educational attainment, as well as investors with low risk
12 investment objectives including those who expressly were saving to pay for their
13 children's college tuition expenses or to pay off a mortgage.

14 94. For example, BD Defendant Okoboji is alleged to have sold MedCap
15 Notes to "an elderly widow of limited finite [*sic*] means with no job or other means of
16 earned income, [who] is substantially dependent on prudent investment of her financial
17 assets with preservation of assets as a key investment objective." (Complaint, *Barber,*
18 *et al. v. Okoboji Fin. Serv., Inc.*, 10-4034 (D.S.D. 2010), D.E. 1.)

19 95. BD Defendant Securities America is alleged to have sold MedCap Notes
20 to a 77-year-old investor with Alzheimer's disease, despite requests by the investor's
21 children that Securities America's registered representative not contact the investor
22 directly in light of his deteriorating mental condition. (*Billitteri v. Sec. Am., Inc., et al.*,
23 09-1568 (N.D. Tex. 2011), D.E. 240, at 52-33.)

24 96. According to testimony before the Massachusetts Securities Division,
25 Securities America sold MedCap Notes to an investor with no college degree, a
26 \$20,000 a year salary, and a net worth of \$800,000 to \$900,000, which was primarily
27 based on the value of her home and a cottage inherited from her parents. This investor
28 now allegedly lives on Social Security payments.

1 97. A FINRA arbitration panel found that BD Defendant Community Bankers
2 was liable to a MedCap investor who alleged the following causes of action: (1)
3 unsuitability; and (2) negligence, misrepresentation, concealment, and breach of
4 fiduciary duty. The FINRA panel awarded over \$700,000 in damages to this single
5 investor, including compensatory damages, plus attorneys' fees and interest. (FINRA
6 Case No. 09-06444 (Jan. 19, 2011).)

7 98. Kathleen Darrow, a Plaintiff and putative class representative in the
8 *Masonek* Action, initiated a FINRA arbitration proceeding against BD Defendant
9 Signature Financial and the registered representative who sold her MedCap Notes,
10 alleging the Notes were not suitable investments for her in light of her investment
11 objectives. Darrow testified at deposition that she had conservative investment
12 objectives and was not in a position to risk losing her capital and that Signature
13 Financial, via its registered representative Tim Pittman, made material
14 misrepresentations to her concerning the MedCap Notes, including but not limited to
15 misrepresenting their risk, illiquidity, return, and suitability.

16 99. Steven J. Masonek, a Plaintiff and putative class representative in the
17 *Masonek* Action, testified at deposition that Andrew Reeves, his registered
18 representative at Signature Financial who recommended and sold MedCap Notes to
19 him, never provided him with a copy of the Private Placement Memoranda for the
20 Notes. He further testified that Mr. Reeves never discussed with him the risks
21 associated with the MedCap Notes. In addition, Mr. Masonek testified that Mr. Reeves
22 may have forged his signature and certain information on his account opening
23 documents, for example by incorrectly inflating his investment experience, net worth
24 and income.

25 100. Joann Hosking, a Plaintiff and putative class representative in the
26 *Masonek* Action, testified at deposition that Andrew Reeves, her registered
27 representative at Signature Financial upon whom she relied to help her make financial
28 decisions, told her that the MedCap Notes were "safe" and failed to disclose the risks

1 of the investments. She further testified that she did not recall reviewing the account
2 opening documents and questioned whether the signature on the documents was her
3 real signature. The signature was further suspicious because she noted that Mr. Reeves
4 had made other transactions separate from MedCap without her knowledge or consent.

5 101. By marketing, recommending and selling the Notes to persons who were
6 not suitable investors for those Notes, the BD Defendants breached their duty of care
7 to those investors. The BD Defendants' conduct violated the standards of care
8 imposed upon broker-dealers engaged in selling private placement offerings such as
9 the Notes to the public as evidenced by the rules of conduct promulgated by FINRA
10 and/or the NASD.

11 102. To the extent that any Plaintiff or member of the putative class in the
12 *Masonek* Action purchased MedCap Notes from a BD Defendant and the Notes were
13 not a suitable investment for the investor in light of the investor's circumstances,
14 including, but not limited to, the investor's age, net worth, income, investment
15 experience, investment goals and tolerance for risk of loss, and that Plaintiff or
16 putative class member suffered damages in connection with the purchase of the
17 MedCap Notes, those damages were directly and proximately caused by the BD
18 Defendant's breach of its obligation to only sell the MedCap Notes to persons who
19 were accredited investors and for whom the MedCap Notes were suitable investments.

20 **2. The BD Defendants Made Misrepresentations and/or Omissions**
21 **Regarding the Risks of the Notes**

22 103. Upon information and belief, the BD Defendants were aware, or should
23 have been aware, of the risks associated with the Notes, but failed to adequately
24 disclose those risks to prospective investors.

25 104. Upon information and belief, each BD Defendant had access to due
26 diligence reports commissioned by MedCap in connection with a number of the Note
27 offerings. Mick & Associates, P.C., LLO ("Mick & Associates"), a due diligence firm
28 in Omaha, Nebraska, was engaged by MedCap to provide due diligence reports to

1 broker-dealers who marketed Notes issued by MP III, MP IV, and MP V.

2 105. Upon information and belief, many of the BD Defendants received copies
3 of Mick & Associates' due diligence reports. Those BD Defendants who did not
4 receive copies of the due diligence reports should have obtained copies, or, in the
5 alternative, should have conducted their own due diligence of MedCap and the
6 MedCap Note offerings, in order to comply with their obligations pursuant to rules of
7 conduct promulgated by FINRA and/or the NASD.

8 106. Upon information and belief, the reports issued by Mick & Associates for
9 MP III, MP IV, and MP V constituted the primary—and, in some cases, the only—
10 form of due diligence relied upon by the BD Defendants. For example, Tom Cross,
11 Chairman of Securities America's Due Diligence Committee and Head of Sales,
12 testified at a deposition before the Massachusetts Securities Division that the due
13 diligence analyst reports were the most heavily relied-upon source of information for
14 Securities America in its due diligence process. Still, the due diligence reports were
15 not, as they ought to have been, an essential component of the BD Defendants'
16 decision to begin marketing MedCap Notes. In fact, upon information and belief,
17 many of the BD Defendants did not even wait for the reports to be completed before
18 they began selling MedCap Notes.

19 107. Mick & Associates' reports highlighted the significant risks associated
20 with the MedCap Notes. These risks made clear that the Notes were suitable
21 investments only for certain investors, depending on the investor's age, net worth,
22 income, investment experience, investment goals, and tolerance for risk of loss.

23 108. Upon information and belief, the BD Defendants failed to disclose the
24 risks associated with the Notes to prospective investors, despite recommendations by
25 Mick & Associates that the BD Defendants provide prospective investors with a copy
26 of Mick & Associates' reports which highlighted these risks.

27 109. Further, in 2006, Mick & Associates provided broker-dealers, including at
28 least some of the BD Defendants, with a "Client Disclosure Form," to be sent to

1 prospective investors, which was intended to highlight for investors the most
2 significant risks of the Notes.

3 110. Upon information and belief, many of the BD Defendants failed to send
4 the Client Disclosure Form to prospective investors. For example, although Mick &
5 Associates urged Securities America to send the Client Disclosure Form to prospective
6 investors, Securities America failed to do so.

7 111. Upon information and belief, by failing to disclose the findings of the due
8 diligence advisors to investors, among other failures, the BD Defendants
9 misrepresented, and/or omitted to describe the nature and extent of, the risks of these
10 investments.

11 112. MedCap forbade the BD Defendants from sharing MedCap's financial
12 statements with prospective investors pursuant to nondisclosure agreements. This
13 arrangement should have raised a red flag about MedCap's business model to each BD
14 Defendant and is representative of the ways that the BD Defendants sold MedCap
15 Notes to investors without providing full disclosure.

16 113. Upon information and belief, each prospective investor had the
17 expectation that the BD Defendant from whom it purchased Notes would accurately
18 represent the risks of the investment. Upon information and belief, each Plaintiff and
19 member of the putative class in the *Masonek* Action who purchased MedCap Notes
20 from a BD Defendant justifiably relied on the respective BD Defendant's
21 misrepresentations and/or omissions.

22 114. To the extent that any Plaintiff or member of the putative class in the
23 *Masonek* Action who purchased MedCap Notes from a BD Defendant suffered
24 damages in connection with the MedCap Notes, those damages were directly and
25 proximately caused by the misrepresentations and/or omissions of that BD Defendant.

26 **3. The BD Defendants Put their Own Profits Ahead of the Interests of**
27 **the Investors**

28 115. Upon information and belief, the BD Defendants marketed and sold the

1 Notes to investors for whom the Notes were not suitable investments, and
2 misrepresented, and/or omitted to describe the nature and extent of, the risks of the
3 Notes, because they cared only about their commissions and the many perks offered by
4 MedCap.

5 116. Upon information and belief, the BD Defendants earned at least \$83.7
6 Million in commissions from the sale of the Notes for MP II, MP III, MP IV, MP V,
7 and MP VI.

8 117. Upon information and belief, executives and registered representatives of
9 the BD Defendants who were loyal to MedCap were also treated to lavish, all expenses
10 paid trips to destinations like Las Vegas, Hawaii, Arizona, and Pebble Beach.

11 118. For example, in March 2005, MedCap treated several of the BD
12 Defendants to a "conference" in Las Vegas. MedCap paid for rooms and all-you-can-
13 eat buffets at the Ritz Carlton hotel, golf, gaming tables, poker chips, and \$144
14 massages. Attendees included:

- 15 a. Tom Cross (Head of Sales, Securities America)
- 16 b. Vic Dalfio (Registered Representative, Signature Financial)
- 17 c. Tom English (Registered Representative, WFP)
- 18 d. George Gilbert (Registered Representative, Community Bankers)
- 19 e. Seth Grano (Registered Representative, Community Bankers)
- 20 f. Jay Idt (VP, Product Distribution, Securities America)
- 21 g. Robert Jackson (Registered Representative, Capital Financial)
- 22 h. Kevin Korhorn (Registered Representative, Securities America)
- 23 i. Michael Lee (Registered Representative, Securities America)
- 24 j. Pamela McClenny (Registered Representative, Capital Financial)
- 25 k. David Rentz (Registered Representative and Owner, Signature
26 Financial)

27 119. Upon information and belief, MedCap provided incentives for broker-
28 dealers to sell MedCap Notes without regard for their suitability for investors.

1 120. MedCap invited the top 15 sellers of MedCap Notes to join it for its
2 “President’s Advisory Council” annual meeting in locations such as Pebble Beach and
3 Scottsdale, Arizona. Broker-dealers and their registered representatives would receive
4 periodic updates of where they stood in the sales rankings. MedCap sent entreating
5 emails to its broker-dealers, urging them to sell more and more notes quickly to beat
6 out other registered representatives and win invites to expensive retreats.

7 121. For example, in October 2006, MedCap hosted a meeting of the “MedCap
8 Advisory Council” at the Four Seasons Resort in Scottsdale, Arizona. The following
9 persons attended this “Advisory Council” session, which involved golf and spa
10 treatments:

- 11 a. Larry Bakken (Registered Representative, Capital Financial)
- 12 b. Jay Idt (VP, Product Distribution, Securities America)
- 13 c. Dean Evans (Registered Representative, Securities America)
- 14 d. Michael Lee (Registered Representative, Securities America)
- 15 e. Steven Hoshimi (Registered Representative, Securities America)
- 16 f. John Guyette (Registered Representative, Community Bankers)
- 17 g. Albert Vandelaan (Registered Representative, CapWest)
- 18 h. Cannen Farrell (Registered Representative, Private Asset Group)
- 19 i. Vic Dalfio (Registered Representative, Signature Financial)
- 20 j. Brian Folland (Registered Representative, National Securities)

21 122. Induced by high commissions and lavish bonuses, the BD Defendants
22 marketed MedCap Notes to persons who were not suitable investors for the Notes, and
23 knowingly or negligently misrepresented the risks of the Notes to prospective
24 investors.

1 **FIRST CLAIM FOR RELIEF**

2 (Equitable Indemnity)

3 123. BNYM realleges and hereby incorporates each and every allegation set
4 forth in Paragraphs 1 through 122 above.

5 124. Each BD Defendant is responsible for any and all damages allegedly
6 suffered by those Plaintiffs or putative class members in the *Masonek* Action who
7 purchased the complained-of MedCap Notes from that BD Defendant.

8 125. In the event of and to the extent that BNYM is determined to be wholly or
9 partially liable in the *Masonek* Action to any Plaintiff or putative class member who
10 purchased Notes from a BD Defendant, BNYM is entitled to total or partial
11 indemnification from that BD Defendant, on the basis of comparative fault, for any
12 costs, expenses, damages, or other relief incurred by or awarded against BNYM.

13 **SECOND CLAIM FOR RELIEF**

14 (Contribution)

15 126. BNYM realleges and hereby incorporates each and every allegation set
16 forth in Paragraphs 1 through 122 above.

17 127. Each BD Defendant is responsible for any and all damages allegedly
18 suffered by those Plaintiffs or putative class members in the *Masonek* Action who
19 purchased the complained-of MedCap Notes from that BD Defendant.

20 128. In the event of and to the extent that BNYM is determined to be wholly or
21 partially liable in the *Masonek* Action to any Plaintiff or putative class member who
22 purchased Notes from a BD Defendant, BNYM is entitled to total or partial
23 contribution from that BD Defendant, on the basis of comparative fault, for any costs,
24 expenses, damages, or other relief incurred by or awarded against BNYM.

25 **PRAAYER FOR RELIEF**

26 WHEREFORE, BNYM prays as follows:

27 1. That, in the event judgment is entered against BNYM in the
28 *Msaonek* Action as to any Plaintiff or putative class member who purchased Notes

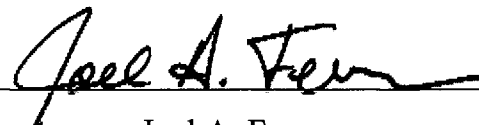
1 from a BD Defendant, BNYM is entitled to total or partial indemnity and/or
2 contribution from that BD Defendant, on the basis of comparative fault, for any costs,
3 expenses, damages, or other relief incurred or awarded against BNYM.

4 2. That BNYM be awarded costs of suit incurred in defense of
5 Plaintiffs' Third Amended Complaint (and any previous and future amendments to
6 Plaintiffs' pleadings), cross-claims, and in prosecution of these third-party claims.

7 3. For such other and further relief as the Court may deem just and
8 proper.

9 Dated: August 1, 2011

GIBSON, DUNN & CRUTCHER LLP

10
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